# National Labor Relations Board Weekly Summary of

## **NLRB** Cases

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#### C A S E S S U M M A R I Z E D VISIT **WWW.NLRB.GOV** FULL TEXT

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Amersino Marketing Group, LLC (29-CA-27623, et al.; 351 NLRB No. 58) Brooklyn, NY Nov. 19, 2007. The Board, in a 3-0 decision, adopted the administrative law judge's decision that the Respondent did not violate Section 8(a)(3) of the Act by discharging employee Eliezer Gallardo because he engaged in protected union activity. In the absence of exceptions, the Board adopted the judge's other findings that the Respondent violated 8(a)(1) by threatening the futility of collective-bargaining if the employees selected the Union, that the Respondent violated Section 8(a)(3) by discharging employees Lopez and Rodriguez because of their protected activity, that the Respondent did not violate the Act by discharging employee Lezama, and that the Respondent did not violate Section 8(a)(1) during a physical altercation between Gallardo and the Respondent's president, Henry Wang. [HTML] [PDF]

The judge had found that Gallardo, who was reprimanded by Wang for a mistake on the inventory, was discharged because he refused to perform inventory, and that his actions had not been unlawfully provoked by the Respondent. Accordingly, because there was no connection between Gallardo's protected conduct and the termination, the judge found that the General Counsel had failed to carry his burden of establishing that the Gallardo's protected conduct was a motivating factor in the Respondent's decision to discharge him. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 f.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

The Board assumed, arguendo, that the General Counsel had met his initial burden, but that the Respondent met its rebuttal burden under *Wright Line* by showing that it legitimately terminated Gallardo for refusing to perform his assigned inventory. The Board first noted that it is "axiomatic" that an employer may lawfully discipline, including discharge, an employee who refuses to work. *Moody Chip Corp.*, 243 NLRB 265, 273 (1979). The Board then noted that Wang did not discharge Gallardo until after Gallardo had refused to perform inventory. Thus, assuming, arguendo, that Wang's reprimand of Gallardo was a pretext, as the judge found, the reprimand did not provoke Gallardo's outburst. Gallardo reacted to a lawful directive to do perform his job.

The Board found inapposite cases cited by the General Counsel, see, e.g., *Louisiana Council No. 17, AFSCME*, 250 NLRB 880, 886 (1980), which hold that an employer may not provoke an employee into committing an indiscretion and then use that indiscretion as a pretext to discharge the employee because of his protected conduct. Unlike those cases, where the respondent's unlawful conduct provoked the employee's outburst, here Gallardo's response was to the Respondent's lawful refusal to assign inventory duties to someone else. Thus, the Board found that the Respondent showed that it would have discharged Gallardo even in the absence of his protected activity.

(Chairman Battista and Members Schaumber and Kirsanow participated.)

Charges filed by Industrial Workers of the World; complaint alleged violations of Section 8(a)(1) and (3). Hearing at Brooklyn, Nov. 8, 9, and 30, 2006. Adm. Law Judge Michael A. Rosas issued his decision Feb. 27, 2007.

The Bohemian Club (20-CA-32922; 351 NLRB No. 59) San Francisco, CA Nov. 19, 2007. The Board reversed the administrative law judge and found that the Respondent violated Section 8(a)(5) and (1) of the Act by assigning stewards' cleaning work to cooks without first giving the Union notice and an opportunity to bargain over the assignment. The Board rejected the judge's reasoning that the Union failed to request bargaining, noting that the Respondent had presented the Union with a fait accompli. Accordingly, the Board found that the Union had not waived its right to bargain. The Board rejected, both on the merits and as not properly before the Board, the Respondent's defenses based on the terms of the parties' expired collective-bargaining agreement. (The judge had rejected those arguments, and the Respondent failed to except to the judge's ruling.) [HTML] [PDF]

In concurrence, Member Kirsanow indicated that, if the Board were writing on a clean slate, he would be inclined to find the unilateral change here to be too trivial to amount to an unfair labor practice, but he agreed with the other panel Members that, in view of prior Board decisions, the assignment was a material, substantial, and significant change in the cooks' terms and conditions of employment. Member Kirsanow also rejected the Respondent's contract-based defenses solely because they were not properly before the Board.

(Members Liebman, Kirsanow, and Walsh participated.)

Charge filed by Unite HERE! Local 2; complaint alleged violation of Section 8(a)(5) and (1). Hearing at San Francisco on Oct. 4, 2006. Adm. Law Judge Jay R. Pollack issued his decision Dec. 12, 2006.

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#### LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Jerry Ryce Builders, Inc. (Bricklayers Illinois District Council 1) Chicago, IL Nov. 19, 2007. 13-CA-43917, 43918; JD-72-07, Judge Mark D. Rubin.

Massey Energy Co. and its Subsidiary, Spartan Mining Co. d/b/a Mammoth Coal Co. (Mine Workers) Kanawha County, WV Nov. 21, 2007. 9-CA-42057; JD-73-07, Judge Paul Bogas.

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### LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(In the following cases, the Board considered exceptions to Reports of Regional Directors or Hearing Officers)

#### DECISION AND CERTIFICATION OF REPRESENTATIVE

AT Systems Atlantic, Inc., Central Islip, NY, 29-RC-11413, Nov. 20, 2007 (Members Liebman, Schaumber, and Kirsanow)

(In the following cases, the Board adopted Reports of Regional Directors or Hearing Officers in the absence of exceptions)

## DECISION, ORDER [setting aside election conducted on Feb. 2, 2007], AND DIRECTION OF SECOND ELECTION

Beacon of Hope of Iowa, Inc., Davenport, IA, 33-RC-5021, Nov. 20, 2007 (Members Liebman, Schaumber, and Kirsanow)

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(In the following cases, the Board denied requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

Foxwoods Resort Casino, Ledyard, CT, 34-RC-2230, Nov. 21, 2007 (Members Liebman and Kirsanow; Member Schaumber concurring) Valley Hospital, Las Vegas, NV, 28-RD-959, Nov. 21, 2007 (Members Liebman, Schaumber, and Kirsanow)

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Miscellaneous Board Decisions and Orders

# DECISION ON REVIEW AND ORDER [affirming the Regional Director's supplemental D&DE]

Multimedia KSDK, Inc., St. Louis, MO, 14-RC-12419, Nov. 20, 2007 (Members Liebman, Kirsanow, and Walsh)

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